

STATE OF NEW YORK

DIVISION OF TAX APPEALS

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In the Matter of the Petition	:	
of	:	
<b>ANTHONY GONCALVES</b>	:	<b>DETERMINATION</b> <b>DTA No. 819804</b>
for Revision of a Determination or for Refund of Sales and Use Taxes under Articles 28 and 29 of the Tax Law for the Period March 1, 1992 through May 31, 1998.	:	

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Petitioner, Anthony Goncalves, 48 Mariomi Road, New Canaan, Connecticut 06840, filed a petition for revision of a determination or refund of sales and use taxes under Articles 28 and 29 of the Tax Law for the period March 1 1992 through May 31, 1998.

A hearing was held before Gary Palmer, Administrative Law Judge, at the offices of the Division of Tax Appeals, 641 Lexington Avenue, New York, New York, on December 8, 2004 at 10:30 A.M., with all briefs submitted by May 17, 2005, which date began the six-month period for the issuance of this determination. Upon Judge Palmer's retirement in June 2005, the case was reassigned to Joseph W. Pinto, Jr., Administrative Law Judge, who renders the following determination. Petitioner appeared by Michael Weitzner, Esq. The Division of Taxation appeared by Christopher C. O'Brien, Esq. (Michael P. McKinley, Esq., of counsel).

***ISSUES***

I. Whether the notice of determination issued by the Division of Taxation to petitioner was barred by the statute of limitations.

II. Whether the audit method utilized by the Division of Taxation was reasonably calculated to determine petitioner's sales tax liability.

III. Whether petitioner was a person under a duty to collect and pay sales and use taxes on behalf of Palisade Plumbing and Heating Corp.

IV. Whether penalties imposed by the Division of Taxation pursuant to Tax Law § 1145(a)(1) and (3)(i) should be abated because petitioner's failure to collect and pay the sales and use taxes and obtain a certificate of authority was due to reasonable cause and not willful neglect.

### ***FINDINGS OF FACT***

1. Following a field audit of Palisade Plumbing and Heating Corp. and a determination that petitioner was a person responsible for the collection and payment of sales and use taxes on its behalf, the Division of Taxation ("Division") issued to petitioner, Anthony Goncalves, a Notice of Determination, dated January 21, 2003, which assessed additional tax in the sum of \$147,005.21, interest of 227,054.58 and penalties of \$54,101.52 for the period March 1, 1992 through May 31, 1998.

2. On or about March 18, 1998, the Division instituted an audit of Palisade Plumbing and Heating Corp. of Yonkers, New York. Appointment letters were sent to the business on March 18, 1998 and April 10, 1998. In addition, appointment letters were sent to officers of the business, Fernando Reis and Anthony Goncalves, on June 3, 1998 and October 5, 1998, respectively. Attached to each letter was a list of documents which the Division requested be made available for audit at the time of the appointment for the period March 1, 1992 through May 31, 1998, including the general ledger, cash receipts and disbursements journal, Federal tax returns, sales tax returns, sales invoices, bank statements, capital improvement, resale, and exempt use and exempt organization certificates.

3. During the course of the approximately five-year audit, between March 18, 1998 and January 3, 2003, the Division made numerous attempts to contact the business, Mr. Reis and Mr. Goncalves. The only meeting that occurred was on April 20, 1999, with an accountant representing Mr. Goncalves, who had no power of attorney and was able to provide only a “box of bills” and bank deposit slips for the period March 1992 through December 1993.

4. Based on the records provided to the Division, the auditor determined that there were inadequate records to perform an audit of the books and records and resorted to an estimated methodology to determine the tax liability of the business.

5. The bank information provided by Mr. Goncalves through his representative at the meeting indicated deposits for the 22-month period March 1992 through December 1993 of \$784,047.00, or average monthly deposits of \$35,638.50. Deposits were treated as sales in the absence of any sales records. The average monthly sales figure was applied to all the months in the audit period for which there were no records, yielding total estimated sales for the audit period of \$2,672,887.50. Based upon experience in conducting audits of plumbing and heating contracting businesses such as petitioner, which the auditor indicated was between 10 and 15 audits, the auditor estimated taxable sales of \$1,336,443.75, or 50 percent of total sales. Tax due on this sales estimate was calculated to be \$110,256.72. The remaining nontaxable sales were treated as capital improvement sales. The auditor then estimated, again based upon her experience, that 33.3 percent of the capital improvement sales represented the materials used in the capital improvements, or \$445,436.70. The tax due on the materials purchases was calculated to be \$36,748.49. Total tax due for the entire audit period was estimated to be \$147,005.21.

6. Palisade Plumbing and Heating Corp. did not file sales and use tax returns for any periods within the audit period and never acquired or applied for a certificate of authority to operate its business.

7. In addition to the estimated tax, penalty and interest the Division determined to be due, it assessed a \$10,000.00 penalty pursuant to Tax Law § 1145(a)(3)(i) for making sales of property or services subject to tax without a valid certificate of authority.

8. Anthony Goncalves came to the United States from Portugal in 1966 at the age of 21. Mr. Goncalves had a high school education and expertise as a welder when he arrived in the United States. After initially working construction as a laborer, he received his certification and was accepted into Local 543 of the Steamfitters' Union, for which he worked until 1977, prior to gaining employment at the General Motors plant in Tarrytown, New York. In addition, Mr. Goncalves worked as a plumbing inspector for the City of Yonkers, New York, where he met Antonio Dos Santos.

9. In or about 1989, Mr. Dos Santos asked petitioner to go into business with him and his wife, Shirley, as Palisade Plumbing and Heating Corp. Mr. Dos Santos had a poor facility for the English language and needed petitioner's help in procuring permits for jobs.

10. For petitioner, this commitment to Palisade Plumbing was a second job, since he continued to work for General Motors in Tarrytown eight hours a day.

11. Petitioner was the president of the business, owned 50 percent of the stock, procured jobs for the company and was its representative to suppliers and customers. Mr. Dos Santos actually performed the work. Petitioner had check signing authority, but most bills were prepared by Shirley Dos Santos, the bookkeeper and treasurer. Mrs. Dos Santos signed all returns filed, including the Employer's Quarterly Federal Tax Return.

12. Petitioner had little or nothing to do with maintaining the books and records of the company and never prepared any sales tax returns. As mentioned, Shirley Dos Santos maintained the books and records of the company and an outside accountant, Mr. Yen Wong, CPA, assisted her in filing returns and advising the corporation on tax matters.

13. Mr. Wong was the company's accountant from its inception in 1989 until 1996 or 1997, preparing various returns for the company and rendering tax advice to it. Mr. Wong was an accountant and had worked for the Internal Revenue Service as an auditor and field agent prior to entering private practice. Further, Mr. Wong prepared individual tax filings for petitioner during the years in issue. When informed that the company only performed work for the City of Yonkers and made capital improvements, he advised the company that there was no point in filing sales tax returns because the company had no taxable sales and did not collect any sales tax.

14. Petitioner sold his interest in the company on January 1, 1994, as noted in an agreement, dated January 1, 1994, between the company, Mr. Dos Santos, Fernando Reis and Joao Carlos Reis, whereby Mr. Dos Santos, Fernando Reis and Joao Carlos Reis agreed to continue the business of Palisade without petitioner. In addition, petitioner notified suppliers in January 1994 that he was no longer the president or a partner in Palisade Plumbing, a fact that was corroborated by Mr. Wong, who said petitioner left the corporation in late 1993 or in the beginning of 1994.

15. Although the audit did not begin until four years after petitioner left Palisade, he was the only person that responded to the Division's audit appointment request. However, petitioner's attempt to get information and documentation on Palisade was as fruitless as the attempts made by the Division.

16. Petitioner was able to obtain verification from Best Plumbing and Supply of Yorktown Heights, New York, which indicated that in 1992 and 1993 invoices to Palisade included sales tax which was collected on all sales to Palisade. The tax paid on those invoices totaled \$806.52. In addition, petitioner submitted proof of seven separate jobs performed for Yonkers Public Schools in 1992 and 1993 demonstrating sales of services and materials to an exempt entity. Also submitted was a letter from JGB Health Facilities Corporation of Yonkers which stated that all work performed for it in 1992 and 1993 was exempt and attached the exempt organization certification form, ST-119.1. Finally, petitioner obtained a notarized statement from Louis Shapiro of Yonkers Plumbing which stated that, during the time petitioner was at Palisade, all sales of material to Palisade were taxed unless a proper exemption certificate was provided.

17. Petitioner was also able to obtain an exempt purchase certificate issued by Palisade, which indicated that it did not pay sales tax on the purchase of materials which were included in capital improvement projects. The undated, unsigned certificate in evidence was associated with a project known as the Open Gate Community Residence in Somers, New York.

#### ***SUMMARY OF THE PARTIES' POSITIONS***

18. Petitioner argues that Mr. Goncalves's testimony demonstrated that the audit methodology was flawed in that the Division of Taxation erred in finding 50 percent taxable sales and additional tax due on purchases of materials. Petitioner believed all work done by the company was capital improvements, any repair work was performed for exempt organizations and tax was paid on all materials purchases where appropriate.

19. Petitioner contends that he was not a person responsible for the collection and payment of sales and use taxes on behalf of Palisade because his job duties were limited to sales

and job estimates and obtaining building certificates. He argues that he had no responsibility for the financial aspects of the business or day-to-day management and only signed checks as a ministerial detail. In the alternative, petitioner argues that the evidence demonstrated that he left the corporation as of January 1, 1994 and cannot be held liable for Palisade's taxes after that date.

20. Petitioner believes that all penalties should be canceled because he and the company were advised by their tax professional that sales tax returns did not need to be filed given the nature of the jobs performed by Palisade and its exempt customers.

21. The Division of Taxation contends that the audit method utilized by it in determining Palisade's tax liability was reasonably calculated, given the lack of books and records provided by Palisade on audit. Further, the Division argues that the burden of proof was on petitioner to show by clear and convincing evidence that the assessment was erroneous or improper and that he has failed to do so by the evidence submitted.

22. The Division believes that petitioner was a person responsible for the collection and payment of sales and use taxes for the corporation because he was president, owned 50 percent of the stock of the company, had the authority to issue checks, answered the appointment letter for the instant audit and received economic benefit from the corporation.

23. Finally, the Division urges that all penalties be sustained against petitioner because his reliance on the advice of his tax professional not to file returns was not reasonable, and with respect to the failure to obtain a certificate of authority, he was never given any advice.

### **CONCLUSIONS OF LAW**

A. The first issue raised by petitioner in his petition but abandoned thereafter was whether the notice of determination was barred by the statute of limitations. Since the Division of taxation has continued to argue the issue, it will be addressed.

Tax Law § 1147(b) provides that the Division of Taxation may not assess additional tax after the expiration of more than three years from the date a return is filed, with the exception that if no return was filed tax may be assessed at any time. Since there were no returns filed herein, there was no time limitation on the issuance of the notice.

B. The second issue presented is whether the audit methodology chosen by the Division was reasonably calculated to determine Palisade's and, derivatively, petitioner's liability. Tax Law § 1138(a)(1) provides, in part, that if a return required to be filed is incorrect or insufficient, the amount of tax due shall be determined based on such information as may be available including, if necessary, an estimation based on external indices. However, the Division may not utilize external indices unless it first determines that the taxpayer's books and records are inadequate for purposes of verifying sales and purchases subject to sales and use taxes (*Matter of Chartair, Inc. v. State Tax Commn.*, 65 AD2d 44, 411 NYS2d 41). To determine the adequacy of a taxpayer's records the Division must first request (*Matter of Christ Cella, Inc. v. State Tax Commn.*, 102 AD2d 352, 477 NYS2d 858) and thoroughly examine (*Matter of King Crab Rest. v. Chu*, 134 AD2d 51, 522 NYS2d 978) the taxpayer's books and records for the entire period of the proposed assessment (*Matter of Adamides v. Chu*, 134 AD2d 776, 521 NYS2d 826, *lv denied* 71 NY2d 806, 530 NYS2d 109). The request for records must be explicit and not "weak and casual" (*Matter of Christ Cella, Inc. v. State Tax Commn., supra*). The purpose of such examination is to determine whether the taxpayer's books and records are so



insufficient as to make it virtually impossible for the Division to verify taxable sales receipts and conduct a complete audit (*Matter of Chartair, Inc. v. State Tax Commn.*, *supra*; *Matter of Ronnie's Suburban Inn*, Tax Appeals Tribunal, May 11, 1989). When the books and records are not sufficient, the Division may resort to external indices to estimate tax.

In this matter the Division made four attempts to obtain books and records of Palisade Plumbing and Heating Corp. but received only 22 monthly bank statements for the period March 1992 through December 1993. Clearly, these statements alone were insufficient to conduct a complete audit for the entire audit period and use of an estimated audit methodology was justified. The auditor used these bank records and her experience with taxpayers in this industry to estimate Palisade's tax liability.

In *Matter of The Humphrey House, Inc.* (Tax Appeals Tribunal, July 31, 1997), the Tribunal stated:

[T]he Division must select an audit method which is reasonably calculated to reflect the tax due (*Matter of Urban Liqs. v. State Tax Commn.*, 90 AD2d 576, 456 NYS2d 138), but exactness in the outcome of the audit is not required (*Matter of Markowitz v. State Tax Commn.*, 54 AD2d 1023, 388 NYS2d 176, *affd* 44 NY2d 684, 405 NYS2d 454). The Administrative Law Judge determined that the record contained sufficient evidence to establish a rational basis for the audit (*Matter of Grecian Sq. v. New York State Tax Commn.*, 119 AD2d 948, 501 NYS2d 219), placing the burden on petitioner to show by clear and convincing evidence that the methodology was unreasonable or that the amount assessed was erroneous (*Matter of Meskouris Bros. v. Chu*, 139 AD2d 813, 526 NYS2d 679).

That standard was met by the Division herein.

C. Without repeating the full discussion of the audit methodology in Finding of Fact "5", using the bank statements provided by petitioner, the Division treated deposits as sales and made various projections and adjustments to arrive at the company's tax liability for the entire audit period. Petitioner produced scant evidence to refute the audit findings. The verification of tax

paid on invoices from Best Plumbing and Supply, the statement from Yonkers Public Schools, the letter from JGB Health Facilities Corporation and the statement from Louis Shapiro of Yonkers Plumbing were not sufficient to show that the Division's chosen audit methodology was unreasonable. It was not clear from petitioner's records what proportion of Palisade's business they represented, which, without a general ledger or sales and purchase journals, was impossible to discern. In addition, petitioner's testimony, without any records to corroborate his claims that all sales were either capital improvements or sales to exempt entities, was not sufficient to establish that the Division's estimated audit methodology was unreasonable (*Matter of Meskouris Bros. v. Chu, supra*).

However, petitioner demonstrated and the Division of Taxation conceded that tax was paid on the Best Plumbing invoices in evidence. The Division is directed to credit \$806.52 against the tax determined to be due for the years 1992 and 1993.

D. Tax Law § 1133(a) imposes upon any person required to collect the tax imposed by Article 28 of the Tax Law personal liability for the tax imposed, collected or required to be collected. A person required to collect tax is defined to include, among others, corporate officers and employees who are under a duty to act for such corporation in complying with the requirements of Article 28 (Tax Law § 1131[1]).

The resolution of whether a person is responsible to collect and remit sales tax for a corporation so that the person would have personal liability for the taxes not collected or paid depends on the facts of each case (*Matter of Cohen v. State Tax Commn.*, 128 AD2d 1022, 513 NYS2d 564; *Stacy v. State Tax Commn.*, 82 Misc 2d 181, 183, 368 NYS2d 448). The relevant factors to consider when determining whether a person has a duty to act for the corporation are whether the person is authorized to sign the corporation's tax returns or is responsible for

maintaining the corporate books, or responsible for the corporation's management (20 NYCRR 526.11[b][2]). Other factors which have been examined include: the authority to hire and fire employees, the derivation of substantial income from the corporation or stock ownership, and the authority to write checks on behalf of the corporation (*see, Matter of Cohen v. State Tax Commn., supra; Matter of Blodnick v. State Tax Commn.*, 124 AD2d 437, 507 NYS2d 536, *appeal dismissed* 69 NY2d 822, 513 NYS2d 1027; *Matter of Autex Corp.*, Tax Appeals Tribunal, November 23, 1988).

Based on the facts adduced in this matter, it is determined that petitioner was a person responsible for the collection and payment of sales and use taxes on behalf of Palisade Plumbing and Heating Corp. Petitioner was the president and co-founder of the business, owning 50 percent of the stock and being an equal partner with Mr. Dos Santos. He derived income from the business and had the authority to sign checks, which he did from time to time, especially when procuring permits from localities. In addition, petitioner was instrumental in procuring jobs for the business and consistently held himself and his reputation out to the public as one of the principals in the business. The fact that he felt obligated to inform suppliers that he was no longer affiliated with Palisade was indicative of his central role in the business as well as a memorial to his departure.

Petitioner's argument that this case is similar to *Matter of Constantino* (Tax Appeals Tribunal, September 27, 1990), is in error. In *Constantino*, petitioner was an officer in name only who was controlled by the true owner of the business and prevented from seeing any business records. Constantino was a paid employee with no ability to make decisions on behalf of the company. Here, petitioner was the president and 50 percent owner of the business and was recognized as the person responsible for bringing in jobs. The fact that he chose to delegate

the financial operations to Shirley Dos Santos is irrelevant. He never testified that he was denied access to the books. He was content to allow Mrs. Dos Santos to handle the finances with the advice of their tax professional. Delegating the responsibility to another will not shield one from the duty to act. (*See, Matter of Ragonesi v. State Tax Commn.*, 88 AD2d 707, 451 NYS2d 301; *Matter of Barton*, Tax Appeals Tribunal, December 28, 1989.)

E. Having established that petitioner was a person responsible for the collection and payment of sales tax on behalf of Palisade, the next issue is for what period. Petitioner has established through his credible testimony, the credible testimony of Mr. Wong and various documents that he left the company as of January 1, 1994. Specifically, those documents were the agreement between the company, Mr. Dos Santos, Fernando Reis and Joao Carlos Reis, whereby Mr. Dos Santos, Fernando Reis and Joao Carlos Reis agreed to continue the business of Palisade without petitioner. That document recited that petitioner had simultaneously sold his shares in the company on January 1, 1994. In addition, petitioner's note to suppliers in January 1994 that he was no longer the president or a partner in Palisade Plumbing supported his claim that he had departed.

In light of this uncontroverted evidence, it is concluded that petitioner left the company as of January 1, 1994 and is not liable for any taxes after that date. Therefore, petitioner is liable only for the period March 1, 1992 through December 31, 1993.<sup>1</sup>

F. The final issue to be resolved is whether petitioner should be liable for the penalties asserted by the Division. The Division assessed penalty pursuant to Tax Law § 1145(a)(1)(i) for failing to file a return and pay over tax within the time required by statute. In addition, penalty

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<sup>1</sup>Tax due for the last month was calculated by the Division directly from Palisade's bank records and totaled \$2,396.90 in estimated tax.

was assessed under Tax Law § 1145(a)(3)(i) for making sales of tangible personal property or services without a valid certificate of authority. Both of these penalties may be remitted if it is determined that the failures were due to reasonable cause and not willful neglect. (*See*, 20 NYCRR 2392.1[a][1]; [h].) In determining whether reasonable cause and good faith exist, the regulations provide several specific grounds and also a catchall which provides for a finding of reasonable cause based upon any ground for delinquency which would appear to a person of ordinary prudence and intelligence as a reasonable cause for delay, demonstrating an absence of willful neglect. (20 NYCRR 2392.1[d][5].) This provision applies to both penalties asserted herein. (20 NYCRR 2392.1[h].) With respect to the penalty asserted pursuant to Tax Law § 1145(a)(3)(i) the regulation requires that reasonable cause be found only if the failure occurred despite the exercise of ordinary business care and prudence. (20 NYCRR 2392.1[h].)

In determining whether reasonable cause exists where a taxpayer relied upon the advice of a tax professional, it must be shown that the taxpayer relied in good faith on such advice and that it was reasonable for the taxpayer to rely on the advice (*see, Auerbach v. State Tax Commn.*, 142 AD2d 390, 536 NYS2d 557, 561; *LT & B Realty v. State Tax Commn.*, 141 AD2d 185, 535 NYS2d 121, 123). To establish that his reliance was reasonable, the taxpayer has the burden of demonstrating that he acted with ordinary business care and prudence in attempting to ascertain his tax liability (*see, United States v. Boyle*, 469 US 241, 85-1 US Tax Cas ¶ 13,602).

The facts demonstrate that petitioner was an immigrant with a high school education who had a good reputation in the business community when he was president of Palisade. He hired a tax professional, Mr. Wong, for himself and his business to assure compliance with the Tax Law. Although the years petitioner spent away from the company and its books and records prevented him from complying with the auditor's request for records and avoiding the use of an indirect

audit methodology, he was able to demonstrate his good faith in both the operation of his plumbing business and his reliance on Mr. Wong's advice. His credible testimony and that of Mr. Wong made it clear that, based on all the information each of these men had during the time petitioner was present at the business, Palisade was only making nontaxable sales, capital improvements and sales to exempt entities. It follows then that his reliance on Mr. Wong's advice to not file tax returns was eminently reasonable. Likewise, it was consistent to not obtain a certificate of authority. Tax Law § 1134(a)(1)(i) provides that persons required to collect sales tax shall file a certificate of registration with the commissioner and obtain a certificate of authority to collect the tax. Since petitioner sincerely believed, based upon his relationship with and trust in Mr. Wong's advice and expertise, that Palisade was not a person required to collect tax, no registration was filed.

To conclude that the audit was valid and additional tax is due is not inconsistent with finding that petitioner has established reasonable cause for the abatement of the penalties assessed. The former is based on a lack of records while the latter is based on petitioner's bona fide belief and credible testimony that no returns were necessary and no certificate of authority mandated because the business made no taxable sales. Petitioner's reliance on Mr. Wong's advice under these circumstances was reasonable and caused the delay in filing and the failure to register.

Given the conclusion reached and the reasoning therefor, Mr. Wong's competence will not be questioned. Ordinary business care and prudence were observed when Mr. Wong determined that the business made no taxable sales and advised that there was no point in filing sales tax returns or obtaining a certificate of authority. (*Cf. Matter of A & V Crown, Inc.*, Tax Appeals Tribunal, May 24, 1990 [wherein it cited *Plante v. Commr.* (49 TCM 963, 966), which stated that

in order to demonstrate that a taxpayer's reliance was reasonable, it must be shown that the advice came from competent tax counsel].) The Division's failure to ask any questions of Mr. Wong at hearing also supports this finding, since it could have raised the issue of his credentials or competence but chose to allow his testimony to go unchallenged.

All penalties asserted against petitioner for the periods he has been found liable are canceled.

G. The petition of Anthony Goncalves is granted to the extent provided for in Conclusions of Law "C", "E" and "F", but in all other respects the petition is denied and the Notice of Determination, dated January 21, 2003, is sustained.

DATED: Troy, New York  
September 1, 2005

/s/ Joseph W. Pinto, Jr.  
ADMINISTRATIVE LAW JUDGE